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Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CHARLES E. CARTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED FOR REVIEW

This petition offers the following questions for review:

1. Is reversal of a perjury conviction required when the trial court, *over objection*, instructs the jury that the issue of materiality is not for their consideration as an essential element of the offense?

2. Is reversal of a perjury conviction required when the trial court, with or without an objection, decides the essential element of materiality?

3. How is United States v. Gaudin, 515 U.S. _____, 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995) applicable to a case involving either scenario set out in questions 1 and 2 hereinabove?

4. Is the holding of the Eleventh Circuit Court of Appeals in the case below in conflict with Gaudin, supra, and other circuits?

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No. 96- _____

IN THE
SUPREME COURT OF THE UNITED STATES
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CHARLES E. CARTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Charles E. Carter, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 19, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix 1a through 2a, to this petition and is unpublished. That court's affirmance without published opinion is noted at 89 F.3d. 854.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on June 19, 1996. A timely Petition for Rehearing was denied by that Court of Appeals on August 20, 1996, and a copy of the unpublished Order Denying Rehearing appears at Appendix 3a to this petition. The unpublished judgment of the Court of Appeals, which was entered on June 19, 1996, and issued as the mandate on August 28, 1996, appears at Appendix 4a through 5a to this petition. The jurisdiction of this Court is invoked

under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, and requires interpretation and application of those constitutional amendments as they apply to petitioner.

Specifically the Fifth Amendment to the United States Constitution provides, in part that:

> No person shall ... be deprived of life, liberty or property, without due process of law ....

The Sixth Amendment to the United States Constitution provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below.

Charles E. Carter was convicted of

one count of perjury under 18 U.S.C. §1623 in the United States District Court for the Northern District of Florida, Tallahassee Division. The basis for federal jurisdiction in the court of first instance was pursuant to 18 U.S.C. §3231.

B. The Facts Material to the Questions Presented.

Charles E. Carter was convicted following a jury trial on one count of having made false material statements to a United States federal trial jury during his testimony, when called as a rebuttal witness, for the government, against the defendant on trial (Daniel L. Hughes). Mr. Carter was accused of perjury when he testified that Hughes had never told him he was involved in the marijuana business. The government's position, based upon other witnesses, who were not

party to any alleged conversation between petitioner and Hughes was that the petitioner, Carter, had admitted that Hughes had told him he was in fact in the marijuana business.

When the petitioner, Charles E. Carter came on for trial on the issue of perjury, following the presentation of evidence, at the charge conference the issue of materiality was raised by the defense. Specifically the trial court was asked by defense counsel to eliminate that certain aspect of the Eleventh Circuit Pattern Jury Instruction dealing with perjury. The government objected to this request/objection by petitioner.

Over objection the trial court charged the jury in part that:

> "... the materiality in the matter involved in the alleged false statement is not a matter with which you are concerned. You are instructed that the

> questions asked the defendant as alleged did constitute material matters in the federal court proceeding referred to in the indictment."

As of the time of the trial of Charles E. Carter, the law in the Eleventh Circuit, and indeed in most other circuits, as to materiality, was one for the court, not the jury to decide. In fact only the Ninth Circuit had consistently held that materiality should be a question of fact for a jury. Subsequent to the trial and conviction of Charles E. Carter (March 1995) this Honorable Court decided United States v. Gaudin, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), which held that the failure to submit the question of materiality to the jury in certain false statement prosecutions did in fact violate a defendant's constitutional right for a jury to determine guilt

beyond a reasonable doubt as to every element of the charged offense.

On appeal the Eleventh Circuit Court of Appeals reviewed the case for plain error. Petitioner submits most respectfully based upon the objection raised, and in the record, that the plain error standard was incorrect. It is respectfully submitted that a challenge to a jury instruction presents a question of law subject to de novo review, and refusal to give a requested jury instruction is thus reviewed for abuse of discretion. United States v. Chandler, 996 F.2d. 1073 (11th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994); United States v. Maduno, 40 F.3d 1212 (11th Cir. 1994), cert. denied ___ U.S. ___, 116 S.Ct. 123, 133 L.Ed.2d 72 (1995) and United States v. Tokars, 95 F.3d 1520 (11th Cir. 1996).

The Court of Appeals, under the plain error standard upheld the conviction, obviously based upon the presumption that the evidence was substantial and overwhelming (under the plain error test).

REASONS WHY THE WRIT SHOULD BE GRANTED

Petitioner submits the decision of the Court of Appeals contravenes holdings in the Eleventh Circuit, and elsewhere in the country, dealing with objected to instructions regarding materiality. The Fifth and Sixth Amendments to the United States Constitution guarantee a criminal defendant the right to a jury verdict based upon jury deliberations as to each and every element of the charged offense ... in this case perjury. Materiality is a basic element required before one can be convicted of perjury.

Based upon the timely objection to materiality being removed from the jury deliberation it is respectfully submitted the Appeals Court erred in affirming the judgment and conviction in this case. Under the dictates of Chandler, Maduno, and Tokars, supra, the appropriate standard is abuse of discretion review. See also United States v. Alerta, 96 F.3d 1230 (9th Cir. 1996).

Under the abuse of discretion review, a reversal is mandated if the instruction fails to correctly state the law. The Eleventh Circuit Pattern Instruction clearly failed to correctly state the law. See United States v. Gray, 96 F.3d 769 (5th Cir. 1996).

Arguing alternatively, as questions were raised by the panel at oral argument that the objection was not precise, it is respectfully submitted that under the

plain error analysis there appears to be conflict in the various circuits as to what is appropriate procedure. It would appear this court has not addressed that important issue dealing with the standard of review that should be appropriate where juries are prevented from deciding an essential element of the charged offense under the plain error analysis. United States v. Baumgardner, 895 F.3d 1305 (8th Cir. 1996); United States v. McGuire, 79 F.3d 1396 (5th Cir. 1996); United States v. Nash, 76 F.3d 282 (9th Cir. 1996); United States v. Pettigrew, 77 F.3d 1500 (5th Cir. 1996); United States v. Keys, 67 F.3d 801 (9th Cir. 1995); United States v. Ross, 77 F.3d 1525 (7th Cir. 1996); United States v. Kramer, 73 F.3d 1067 (11th Cir. 1996); and United States v. Lopez, 71 F.3d 954 (1st Cir. 1995). See also United States

v. Alerta, supra.

Petitioner is aware that this court has recently been faced with a similar issue, regarding unobjected to instructions/materiality issues in case number 96-203 on the petition of Joyce B. Johnson v. United States of America for review. It is the understanding of petitioner that the government in the Johnson matter has in fact conceded that a petition for writ of certiorari in that matter should be granted, in order to reconcile Gaudin issues, now in conflict within the circuits.

It is respectfully submitted in the case as to petitioner Carter that the harmless error analysis, if presumed to be appropriate, which petitioner suggests most respectfully it is not, cannot be viewed in a vacuum. The record of the trial of petitioner Carter reflects

immediately after jury deliberations, and the rendition of the guilty verdict, at least one juror had doubts, and requested of the Clerk an opportunity to advise the Court regarding same. That juror was directed to write the Court ... which she did. Additional comments were found in newspaper articles by other jurors suggesting that the standard of review may have been something other than that charged by the Court. In any event under the "harmless" test it cannot be said from the record that the evidence was overwhelming and thus the "error" in taking the materiality issue away from the jury in this case was indeed harmless. If the jury had difficulty in convicting the petitioner on only two elements of the three elements required of a perjury conviction, the issue of materiality would have been an additional

burden for the jury to overcome.

Petitioner was denied his Fifth and Sixth Amendment rights in conjunction with the presentation of a materiality issue to the jury in this case.

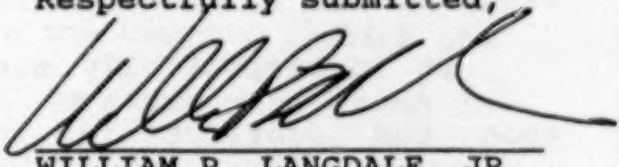
It is respectfully submitted based upon the conflict in the circuits, especially in light of Keys, supra, if it is determined that in fact no appropriate objection was made to the materiality instruction, this matter should be reviewed by this Honorable Court.

Alternatively, as is suggested by petitioner, as predicate argument, a timely objection was in fact made, review is appropriate here based upon the error of the Eleventh Circuit in reviewing the case on materiality against petitioner under the plain error standard as opposed to the abuse of discretion standard, as mandated by Gaudin, supra.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,



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No. 96- _____

IN THE
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OCTOBER TERM, 1996

CHARLES E. CARTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 19 1996
MIGUEL J. CORTEZ
CLERK

No. 95-2943

D. C. Docket No. TCR-94-04034-CO3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES EDWARD CARTER, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(June 19, 1996)

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and REAVLEY*, Senior Circuit Judge.

*Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

Judgment Entered: June 19, 1996
For the Court: Miguel J. Cortez, Clerk
By: _____
Deputy Clerk

ISSUED AS MANDATE: 8/28/96

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[1] 11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 20 1996
MIGUEL J. CORTEZ
CLERK

No. 95-2943

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES EDWARD CARTER, JR.,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: TJOFLAT, Chief Judge, BLACK, Circuit Judge, REAVLEY*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

ORD-42
(6/95)

*Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 19 1996
MIGUEL J. CORTEZ
CLERK

No. 95-2943

D. C. Docket No. TCR-94-04034-CO3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES EDWARD CARTER, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(June 19, 1996)

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and REAVLEY*, Senior Circuit Judge.

*Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

Judgment Entered: June 19, 1996
For the Court: Miguel J. Cortez, Clerk
By: Matt Lamb
Deputy Clerk

ISSUED AS MANDATE: 8/28/96

---

[1] 11th Cir. R. 36-1 provides:
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(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
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(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Supreme Court, U.S.
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No. 96-781

In the Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES E. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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8 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed petitioner's perjury conviction after the district court, without objection, decided the issue of materiality itself.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-781

CHARLES E. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 89 F.3d 854 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1996. A petition for rehearing was denied on August 20, 1996. Pet. App. 3a. The petition for a writ of certiorari was filed on November 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on one count of perjury, in violation of 18 U.S.C. 1623. He was sentenced to 60 months' imprisonment, to be followed by three years' supervised release, and was fined $12,000. Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1a-2a.

1. Petitioner testified falsely at the criminal trial of Daniel Levon Hughes and others. At the time of Hughes's trial, petitioner was the Sheriff of Echols County, Georgia. Petitioner was called as a rebuttal witness for the government to refute Hughes's testimony that Hughes had been working with petitioner in a reverse sting operation by law enforcement authorities. Petitioner testified that Hughes had never told him that he was in the marijuana business. Petitioner further testified that Hughes had never mentioned the drug business to him at all before a search of Hughes's residence on January 21, 1993. Gov't C.A. Br. 3-4.

That testimony conflicted with information petitioner had provided to an agent of the Georgia Bureau of Investigation and to an agent of the Georgia Drug Task Force. Georgia Drug Task Force Special Agent Trish Grina testified that she met with petitioner and Hughes, whom petitioner had identified as a confidential informant who had information about marijuana smuggling and trafficking by a family in Jennings, Florida. Hughes gave petitioner and Grina specific information about a load of marijuana, including its current location and planned delivery. Petitioner later told Grina that Hughes had disclosed that

information because he was afraid he had sold marijuana to an undercover agent. Gov't C.A. Br. 3-6.

Special Agent Ronnie Thompson of the Georgia Bureau of Investigation also testified that petitioner had discussed with him his knowledge of Hughes's drug activities. In December 1992, petitioner told Thompson that Hughes had given him information about marijuana smuggling because people who had been providing Hughes with marijuana had begun dealing with someone else. Petitioner further told Thompson that Hughes had told him on several occasions about being in the marijuana business. Gov't C.A. Br. 6-7.

2. At trial, the district court followed then-prevailing law and decided the element of materiality itself. See *United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983). Petitioner made no objection to that procedure. Gov't C.A. Br. 16; see also Pet. C.A. Br. 19-20, 31. He did object to the introduction of evidence concerning materiality, and to the portion of the standard Eleventh Circuit jury instructions that advised the jury that the materiality element of the offense had already been decided by the court. He argued that, because materiality was an issue for the court to decide, there was no need to inform the jury of the matter, and that telling the jury that the government had already satisfied one element of the offense could prejudice the defense. See Pet. C.A. Br. 19-20, 31; see also Gov't C.A. Br. 16.

3. After petitioner was convicted, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Constitution requires submission to the jury of the issue of materiality when it is an element of a charged offense. On appeal, petitioner contended that the district court had committed plain error in failing

to submit the issue of materiality to the jury. Pet. C.A. Br. 29-35.

The government argued that, as in *United States* v. *Kramer*, 73 F.3d 1067 (11th Cir.), cert. denied, 117 S. Ct. 516 (1996), petitioner had failed to satisfy the requirements for reversal under plain error review. Because petitioner's false statements were clearly capable of influencing the jury, and because there was no indication that the court's own determination of the materiality issue seriously affected the fairness, integrity, or public reputation of judicial proceedings (see *United States* v. *Olano*, 507 U.S. 725, 736 (1993)), the government urged affirmance of the conviction. Gov't C.A. Br. 15-18. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

DISCUSSION

Petitioner contends (Pet. 8-13) that the court of appeals erred in refusing to reverse his conviction on the ground that the district court failed to submit the issue of materiality to the jury. Conceding (Pet. 7-8) that the court of appeals apparently used plain error analysis to affirm his conviction, he observes (Pet. 10-11) that the circuits are in conflict concerning the appropriate standard of review for *Gaudin*-type errors to which a defendant made no objection at trial. Because that is the issue on which the Court granted certiorari in *Johnson* v. *United States*, No. 96-203 (to be argued Feb. 25, 1997), the Court should hold this petition pending its decision in that case.*

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* Petitioner now claims (Pet. 8-9) that he did object to the district court's jury instructions removing materiality from the jury's consideration, but he admits that the objection might not be considered "precise" and therefore argues in the alternative

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

JANUARY 1997

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that, if in fact no objection was made, his case should be reviewed along with *Johnson*.

In fact, petitioner did not object to the district court determination that he now challenges in this Court. Petitioner did object to the district court's decision to inform the jurors that the court had decided the issue of materiality. He did not, however, object to the court's failure to submit the materiality issue to the jury. See ~~7 R.~~ 47-49; Pet. C.A. Br. 19-20, 31; Gov't C.A. Br. 16.

3/16/95 Tr.